Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 1997

ANTHONY & LAURA GIAIMO,
Petitioners,

vs.

UNITED STATES OF AMERICA;
STANLEY MATULEWIC,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred by affirming the trial court's grant of summary judgment to the United States on the issue of whether the IRS complied with the notice requirements of 26 U.S.C. § 6335, considering the IRS did not serve the notice of seizure on Anthony Giaimo and served the notice of sale on the Giaimos by certified mail.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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The opinion of the Court of Appeals issued in support of its judgment is unpublished, but reported as *Anthony M. Giaimo; Laura Giaimo v. United States Government; Stanley Matulewic*, No. 97-1758, 1998 U.S. App. LEXIS 2834 (8th Cir. 1998), and is reprinted in Appendix A.

The opinion of the District Court is unpublished, but reported as *Anthony Giaimo, et al. v. Shirley Peterson, et al.*, No. 4:94-CV-1447 (CEJ), 1997 U.S. Dist. LEXIS 3500 (E.D. Mo. 1997), and is reprinted in Appendix B.

The memorandum of the District Court is unpublished and reprinted in Appendix C.

JURISDICTION

The opinion of the Court of Appeals in this case was filed on February 23, 1998. This petition is therefore timely under this Court's Rule 13.1.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

This case involves application of the following statute.

Section 6335. Sale of seized property

> **(a) Notice of seizure**.--As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property, . . . or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address . . . .
>
> **(b) Notice of sale**.--The Secretary shall as soon as practicable after seizure of the property give notice to the owner, in the manner prescribed in subsection (a) . . . .

26 U.S.C. Section 6335 (1988).

STATEMENT OF THE CASE

On June 30, 1994, the Internal Revenue Service ("IRS") filed a notice of nominee federal tax lien against five parcels of real property deeded to A. Giaimo Family Trust. (C-2[1]). The IRS concluded that because Anthony and Laura Giaimo ("Giaimos") were grantors, trustees, and sole beneficiaries of the trust, they were the real owners of the properties for the purposes of attaching the tax lien. *Id.*

The same day, Revenue Officer Dave Langvardt

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[1] References are to pages of the Appendices of this Petition.

("Langvardt"), seized the properties which are the subject of this Petition, by serving notices of seizure on Laura Giaimo, individually, at her place of business. *Id.* After serving Laura Giaimo and leaving the premises, Langvardt returned because he forgot to give his business card to her.

On July 5, 1994, Langvardt received a certified letter from Laura Giaimo disputing the legality of the tax lien, levy, and seizure; denying she owed any additional taxes; accusing him of trespass and harassment; and warning that she would exercise her legal rights against him if he illegally encroached upon her private property. Langvardt forwarded her letter to district counsel for possible response.

Shortly thereafter, on July 13, 1994, Laura Giaimo met with Thomas Pliske, Senior Attorney, at the IRS district counsel's office.

On July 26, 1994, the Giaimos filed a complaint to quiet title the properties (C-1) and contemporaneously filed and recorded a lis pendens.

On or about September 29, 1994, the Giaimos received notices of sale that were sent by regular and certified mail to their residence and places of business. (C-3). The United States did not serve, or attempt to serve, Anthony Giaimo with the Notice of Seizure at any time. Nor did they attempt personal service of the notices of sale on the Giaimos.

On October 27, 1994, the IRS sold the Giaimos' properties at public auction (C-3) to Stanley Matulewic and Robert Dehn.

Later the same day, Langvardt visited Laura Giaimo at her place of business, informed her that he had sold her properties, and personally served a summons on her.

On December 22, 1994, the Giaimos filed a supplemental complaint joining Matulewic and Dehn as parties.

On November 21, 1994, Langvardt received a letter from Laura Giaimo requesting her appearance date be rescheduled relative to her summons. On the same day, he received a call from her and they agreed on a new date and time.

During January 1995, Laura Giaimo sent certified letters to the Attorney General and several Congressmen making complaints similar to those in her above noted letter to Langvardt that he received July 5, 1994.

On March 13, 1995, the Giaimos moved for summary judgment on the issues of whether the IRS failed to strictly comply with the notice requirements of 26 U.S.C. § 6335. On August 14, 1995, the United States responded in opposition. On August 22, 1995, the Giaimos filed a reply brief.

On December 19, 1995, the court granted a motion to

substitute Robert Matulewic for Robert Dehn as a party, since Dehn had sold his certificate of sale to Matulewic.

On April 12, 1996, the district court granted, *sua sponte*, summary judgment for the United States on the issues of whether the IRS properly served the notices of seizure and sale on the Giaimos. (Appendix C). On February 4, 1997, the district court dismissed the remaining issues without prejudice and entered a final judgment imposing its earlier grant of summary judgment for the United States. (Appendix B).

The Giaimos timely filed an appeal challenging the trial court's determination that the IRS had strictly complied with the notice requirements of 26 U.S.C. § 6335. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

On February 23, 1998, the Court of Appeals affirmed *per curiam*. (Appendix A).

The Giaimos timely file this Petition for Writ of Certiorari with this honorable Court.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED BY AFFIRMING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT TO THE UNITED STATES ON THE ISSUE OF WHETHER THE IRS STRICTLY COMPLIED WITH THE NOTICE REQUIREMENTS OF 26 U.S.C. § 6335 BECAUSE THE IRS DID NOT SERVE THE NOTICE OF SEIZURE ON ANTHONY GIAIMO AND SERVED THE NOTICE OF SALE ON THE GIAIMOS BY CERTIFIED MAIL.

I. Summary

This case deals simply with the notice requirement of a federal statute. Because the Giaimos work and live in the same revenue district as the subject property, the statute requires, on its face, that notice in writing either be given to the Giaimos or left at their home or business. It is undisputed that neither requirement was met for the notice of seizure as to Anthony Giaimo or for the notice of sale as to the Giaimos. The United States claimed in their pleadings that Langvardt was afraid to personally serve the Giaimos or enter their property.

The district court circumvented the statute's requirement by ruling that Langvardt's fear and the presence of "no trespassing" signs on Giaimos' properties justified service by certified mail under the statute's exception for owners who "cannot be readily located." (C-

6 & 7). The Court of Appeals affirmed, *per curium*, stating that the Giaimos received sufficient notice and should not be rewarded for their "hostile and obstructive conduct." (A-2 & 3).

These decisions were erroneous because the exception is inapplicable on the clear language of the statute, and the opinions are contrary to unanimous appellate decisions to the contrary and a decision of this Court.

II. 26 U.S.C. § 6335

In the Internal Revenue Code, Congress has specified the essential steps for the seizure and sale of real and personal property. Two of the essential steps are contained in the clear and unambiguous language of § 6335, which provides that the Secretary or his delegate is authorized and required to personally serve a notice of seizure and notice of sale on the owners of real and personal property, or that the notice shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. The service requirements in relevant part are as follows:

> **Section 6335. Sale of seized property**
>
> **(a) Notice of seizure**.--As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property, . . . or shall be left at his usual place of abode or business if he has such within the internal revenue

> district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address....
>
> **(b) Notice of sale**.--The Secretary shall as soon as practicable after seizure of the property give notice to the owner, in the manner prescribed in subsection (a) . . .

26 U.S.C. § 6335. *See also*, 26 C.F.R. § 301.6335-1(a) & (b)(1) (same).

The language of § 6335 is crystal clear, and Congress has mandated very specific methods by which notice of seizure and notice of sale "***shall***" be given. Service by mail is only permitted where "the owner cannot be readily located, or has no dwelling or place of business within [the] district." The determination of whether an owner "cannot be readily located" does not mean "personally located at some given time," as the courts' below assume. Taken in context, it must mean that it cannot be determined if the owner is EVER located in the district. Otherwise, the language would conflict with the express service requirement that the written notice be left at his home or business (assumptively when the owner is not at home or work when the United States appears to effectuate service).

It goes without saying that since the Giaimos do have both their home and businesses in the district, the second prong of the service requirement could always be met. The

United States cannot use the exception clause to justify its decision not to comply with the statute where it has the ability to comply.

Congress was aware when § 6335 was enacted that a tax sale not in strict compliance would be void because this Court made clear long ago that:

> That no individual or public officer can sell, and convey a good title to, the land of another, unless authorized so to do by express law, is one of those self-evident propositions to which the mind assents, without hesitation; and that the person invested with such a power **must pursue with the precision the course prescribed by law, or his act is invalid**, is a principle which has been repeatedly recognized in this Court.

Thatcher v. Powell, 6 Wheat. 119, 125 (1821).

The United States was aware of this rule of law when they seized and sold Giaimos properties. The IRS itself issued a memorandum written in 1987 which provides both an analysis and instructions to its agents of the requirements contained in § 6335. The IRS concludes in its memorandum that: (1) strict compliance with statutory provisions is required to validate tax sales, and that strict construction applies to all portions of the statute; (2) failure on the part of the government to comply with the notice requirements of § 6335 voids the sale; (3) the IRS may not mail the notice of seizure and/or sale to an owner or

possessor who is in the district; and (4) a notice of seizure and/or sale in the district must be **hand-delivered** to the owner or possessor by the delegate of the Secretary (generally the revenue officer) at his place of abode or business.

The federal appellate courts have properly and strictly applied this rule of law, except in the instant matter. In *Reece v. Scoggins,* 506 F.2d 967 (5th Cir. 1975), an IRS agent served notice on Reece that the IRS had seized the property in question because of his failure to pay certain income taxes. During the next two weeks, the agent twice visited Reece's home to give him notice of a public auction sale of the land but found no one at home and departed without leaving any written notice at the residence. The agent published notice of the sale in a newspaper circulated in Butts County and posted similar notices at the courthouse and various locations in the county. A certified letter containing the notice of sale was also delivered to Reece's residence. Nevertheless, the Fifth Circuit invalidated the seizure and sale because the United States had failed to personally serve the notice:

> The mailing of notice, even if done in a timely fashion, satisfies the statute only if the taxpayer has no dwelling or place of business within the revenue district.
>
> The language of this section is clear and mandatory; absent literal compliance with its provisions, the government sale of land cannot stand. *Reece*, 506

F.2d at 971.

In *Colorado Property Acquisitions, Inc. v. United States*, 894 F.2d 1173, 1174-1175 (10th Cir. 1990), the IRS insisted upon strict compliance with 26 U.S.C. § 7425. There, a lienholder—superior to the IRS—sent notice of non-judicial foreclosure to the IRS as required under § 7425. The notice, however, was sent by regular mail when the statute requires notice by certified or registered mail. The IRS asserted its lien against the transferee of the purchaser after the sale. The United States argued that the notice sent by regular mail failed to comply with § 7425 and, therefore, it did not receive an effective notice. Citing decisions of this Court, the Tenth Circuit agreed and invalidated the sale:

> The mandatory statutory language which sets forth a particular and specific method of delivery of notice demonstrates beyond argument that other methods of delivery of the foreclosure notice, such as service by ordinary mail as occurred in the instant case, are impermissible. As the Supreme Court stated in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979) (quoting *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 [7 AFTR 8847] (1929)): "'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" Congress has the right to specify a particular method of delivery of notice and when it does so the statutory requirement must be met in order to

> effect valid notice.
>
> We recognize the harshness of this rule. This rule allows the IRS to **receive actual notice**, as it did in the instant case, **ignore the notice** and still retain the right to levy upon the property. The remedy, if any there is to be, must come from Congress and not from the Court. [Emphasis added].

Colorado Property, 894 F.2d at 1174-1175.

In *Kulawy v. United States*, 917 F.2d 729 (2nd Cir. 1990), an IRS agent gave public notice eight days prior to the sale of two restored Chevrolet Corvettes rather than the ten days required by § 6335. The trial court ruled that the government's eight day notice was only *de minimis* noncompliance and that Kulawy had failed to show any resulting prejudice. Reversing the trial court, the Second Circuit ruled that the trial court erred when it determined: (1) strict compliance by the government with § 6335(d) was not required, and (2) Kulawy was required to show prejudice resulting from the improperly short notice. The Second Circuit held that the extraordinary powers granted to the United States of levying, seizing and selling property for tax collection purposes without prior judicial hearing are dependent upon strict compliance with the procedures prescribed by statute. *Kulawy*, 935 F.2d at 734.

In *Goodwin v. United States*, 935 F.2d 1061 (9th Cir. 1991), two IRS agents went to the residential real property where Goodwin resided. The agents attempted to deliver

a notice of levy and seizure but Goodwin was not there. Subsequently, the agents mailed the notices by certified mail. Goodwin contacted the IRS after receiving the notices, promised to pay the taxes, but made no payments. Two months later, the IRS mailed Goodwin a Seizure and Sale Worksheet which established the minimum bid price for the residential property. Goodwin promised to pay the minimum bid price within a month but again made no payment. The IRS then posted a Notice of Public Auction Sale to be held three weeks later. *Goodwin*, 935 F.2d at 1063.

The sale was held, but no bidders appeared. The property was declared sold to the United States pursuant to § 6335(e)(1)(C). Approximately eight months later, the District Director's Deed was filed with the County Recorder's Office. Goodwin then filed a complaint which alleged that the seizure and sale were invalid because of defective service. Furthermore, Goodwin sought an order restraining the United States from selling the property. The trial court found that the notice received by Goodwin was sufficient and refused to issue the restraining order. *Goodwin*, 935 F.2d at 1063. Subsequently, the United States filed a motion for summary judgment which was granted by the trial court. The trial court ruled that serving the notices by certified mail satisfied the requirements of § 6335, and Goodwin appealed. *Id.*

The United States conceded on appeal that a literal reading of § 6335 requires it to personally serve a written notice to Goodwin or to have left the written notice at

Goodwin's usual place of abode. The Government argued, however, that a literal reading of § 6335 is not required. *Goodwin*, 935 F.2d at 1064. According to their argument, Goodwin could not demonstrate a lack of actual notice, and therefore he could not show prejudice resulting from *de minimis* noncompliance. *Id.* Furthermore, the United States argued every conceivable equitable issue as to why it did not need to literally comply with the statute.

The Ninth Circuit **disagreed** with each and every argument advanced and adopted the *Kulawy* decision rendered by the Second Circuit:

> The Second Circuit, in *Kulawy v. United States*, 917 F.2d 729 (1990), recently addressed the question whether there must be strict compliance with the notice requirements of § 6335. The Second Circuit held that the extraordinary powers granted to the government of levying, seizing and selling property for tax collection purposes without prior judicial hearing ***are dependent upon strict compliance with the procedures prescribed by statute***. *Id.* at 734.
>
> . . . the necessity for complying with § 6335(d) could be no greater than the necessity for complying with §§ 6335(a) and 6335(b). In following the Second Circuit, we hold that ***the*** language and purpose of § 6335(a) and § 6335(b) require that the government be held accountable for failure to strictly comply with the procedures prescribed by the two provisions. *See Kulawy*, 917

F.2d at 735.

> Moreover, because § 6335 requires strict compliance, **Goodwin did not have the burden of demonstrating prejudice**. *Cf. id.* . . .
>
> Although we would not apply a literal reading of a statute that required a result demonstrably in conflict with the drafter's intentions, no such apparent conflict exists here. (Cite omitted). Congress has set forth **precise requirements for notice of seizure and sale of property** in tax deficiency situations. "[W]hen the government seeks to enforce the laws, **it must follow the steps which Congress has specified**." *Reece*, 506 F.2d at 971. The government did not give Goodwin the notice required by § 6335. Accordingly, as between Goodwin and the government, the seizure and sale of the Gladstone property was invalid. [Emphasis added].

Goodwin, 935 F.2d at 1065.

In *Title Ins. Co. of Minnesota v. I.R.S. of United States*, 963 F.2d 297 (10th Cir. 1992), the Tenth Circuit again strictly applied the Internal Revenue Code, but this time against the IRS. The IRS failed to send a written notice of intent to redeem property as required by treasury regulations within the regulatory time period. Even though the IRS gave verbal notice, the Court held "[t]here was simply no compliance with the mandatory provisions of

C.F.R. Section 301.7425-4(b)(4)(ii), which in our view is sufficient to invalidate the certificate of redemption...." *Id.* at 302.

In *Anderson v. United States*, 44 F.3d 795 (9th Cir. 1995), the Ninth Circuit reversed the district court's judgment in favor of the United States, invalidated the IRS' tax sale, and ruled that: "We, like other circuits, have always required strict compliance by the government with § 6335." *See also Powelson v. United States*, 979 F.2d 141, 144 (9th Cir. 1992); *Johnson v. Gartlan*, 470 F.2d 1104, 1106 (4th Cir. 1976); *Margiotta v. United States*, 214 F.2d 518 (2nd Cir. 1954).

Under great weight of authority, strict compliance with § 6335 must precede a valid seizure and sale of Giaimos' properties by the United States. Indeed, the decisions below so held. (C-5 "absent literal compliance with the notice provisions of § 6335, the government sale of real property must be invalidated;" C-7 "the manner by which [the Giamos] were notified of the proposed sale . . . constituted strict compliance with the notice provisions of § 6335;" A-2 "we agree with the District Court that, in the circumstances, the Giaimos received sufficient notice of seizure and sale.")

III. Not readily located

The decisions below, however, sidestepped their recognition of this rule by holding that the alleged fear on

the part of agent Langvardt[2] equated to the Giaimos not being readily located.

This analysis is contrary to the clear statutory language as noted above and case authority.

In *Bretz v. United States*, No. TY-89-290-CA (E.D. Tex. March 4, 1991), the IRS sale of the Bretz' principal residence was invalidated because the United States served the notice of sale by certified mail. There, the United States contended that service by mail was necessary because it feared that violence might be used against its representatives. However, the *Bretz* court noted that the United States admitted when a potentially dangerous situation arises, a revenue officer can request an armed escort to accompany him. This procedure was, in fact, used when the notice of seizure was served upon Mr. Bretz, but was not followed for the notice of sale. *Bretz*, at *3.

In *United States v. Good Samaritan Church*, 70

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[2] While the United States argued that Langvardt feared approaching the Giaimos or their abode or businesses, no contemporaneous writing in his official Investigation History Sheets indicated either that he feared for his safety or had any problems whatsoever serving documents on the Giaimos. Neither did IRS Senior Attorney Thomas Pliske's reference to Langvardt's personal service of the notice of seizure on Laura Giaimo in a letter to the Giaimos make reference to any difficulties in serving them. Indeed, Langvardt personally served a summons on Laura Giaimo the same day he sold her properties.

A.F.T.R.2d 92-6155 (D.C. Alaska 1992), the United States sought to quiet title to property it had purchased at an IRS sale. There, the United States acknowledged its failure to strictly comply with the notice requirements of § 6335(b). However, it moved the court to recognize an exception to the mandate of *Goodwin*, where personal service was made difficult through threats of violence to IRS agents by Mr. Przybyla. The district court refused to carve out an exception since the government did not produce any evidence to show significant threats of physical violence anytime within the six-year period separating Przybyla's conviction in 1983 and when the notice of sale was mailed in 1989. In fact, the court found that the United States was not afraid to approach Mr. Przybyla in August 1987 when it served him personally with the notice of seizure at their Anchorage office. The court held that, as a matter of law, the sale of the subject property was invalid due to the United States' failure to strictly comply with the notice provisions of § 6335.

In *Martin v. Rubel Enterprises*, 73 A.F.T.R.2d (P-H) 1762 (9th Cir. 1994), the Ninth Circuit held the seizure and sale of Martin's property was invalid. Martin owned a piece of property in San Bernardino County, California. The IRS filed a notice of lien on the property. The property was seized by the IRS and Martin was given notice of the seizure. Notice that the property was to be sold was mailed to Martin on August 18, 1989. The revenue officer handling the case mailed the notice apparently because he felt that Martin was too dangerous to be approached individually by an IRS officer but that

Martin would sign for certified mail.

On September 1, 1989, the property was sold by the IRS to Paul Rubel. After he paid the purchase price, Mr. Rubel was issued a certificate of sale naming Rubel Enterprises as the purchaser. Rubel recorded the certificate in San Bernardino County. Martin did not redeem the property, as he could have by paying the sale price plus interest, within 180 days of the sale. The IRS then deeded the property to Rubel and Rubel recorded the deed.

Addressing these facts, the Ninth Circuit held:

> This case involves a procedural failure by the IRS indistinguishable from that which occurred in *Goodwin*. There is no evidence in the record that Martin could not "be readily located, or [had] no dwelling or place of business within [the Internal Revenue] district." 26 U.S.C. § 6335(a). In fact, according to the IRS "Seizure Activity Report Data" sheet attached to Martin's brief, it appears that notice was mailed to Martin "because of his isolation, he should [not] [sic] be approached in person (danger to IRS employees), and he does sign for his cert. mail." **Under the clear language of the statute, these are not permissible reasons for failing to deliver notice to Martin in person or to his home or place of business**. Accordingly, as between Martin and the government, the seizure and sale of Martin's property was invalid.

On remand (*Martin v. Rubel Enterprises*, CV 92-3184 DT (Tx) (C.D.Cal. 1994)), the trial court addressed the issue of a good faith purchaser for value as instructed by the Ninth Circuit. The trial court found in pertinent part that: (1) Rubel Enterprises was a bona fide purchaser for value; (2) Rubel Enterprises had constructive notice of 26 U.S.C. § 6339(b)(2), which requires that the IRS substantially comply with the provisions of law before said tax deed may be considered to operate as conveyance of all right and interest of the party delinquent had in and to the real property thus sold; and (3) an invalid deed does not confer any rights upon a bona fide purchaser for value, "[a]n instrument that is void of [sic] initio is comparable to a blank piece of paper so necessarily derives no validity from the mere fact that it is recorded." In the instant matter, a lis pendens was filed, indexed, and published prior to the tax sale.

IV. Contrary authority

While not referenced in the opinion below, the United States cited some district court decisions and a Second Circuit case as authority for the propositions that (1) the phrase "cannot be readily located" includes those who have taken steps to discourage personal service, or (2) actual notice of seizure and sale is sufficient to comply with the notice requirements of § 6335.

These decisions, and reliance thereon, are misplaced as discussed below.

(1) *Howard v. Adle*

The United States' reliance on *Howard v. Adle*, 538 F.Supp. 504 (E.D. Mich. 1982), was misplaced. That decision was decided before the plethora of recent appellate decisions were rendered. The *Howard* Court misread both *Reece* and *Aqua Bar and Lounge v. United States*, 438 F.Supp. 655 (E.D.Pa. 1977), for the proposition that "noncompliance with the notice of sale requirements renders the sale ***voidable***." In *Reece*, the Fifth Circuit ruled: "absent literal compliance with [the statute's] provisions, the government sale of land cannot stand." In *Aqua Bar* it was determined: "Once this Court finds that the prescribed method was not followed, then the Court must invalidate the tax sale," and "[t]he Government's failure to comply with the notice requirements of 26 U.S.C. Section 6335 ***voids*** the sale." The *Howard* Court incorrectly interpreted these cases and, therefore, its reasoning is faulty.

The *Howard* Court also thought it had meaning that Howard was an attorney and had previously been through a tax sale of property. He was an attorney able to appreciate the nature of the defective notice, and he had redeemed the same property the year before. The *Howard* case is an erroneous interpretation of the law, according to the recent appellate decisions. *See also Douglas v. United States*, 562 F.Supp. 593, 596 (S.D. Ga. 1983) (interpreting *Reece* as standing for the proposition that, in the context of the sale of property, the IRS must comply completely with the statutory requirements); *Ringer v. Basile*, 645 F.Supp.

1517, 1524 (D.C. Colo. 1986) (citing *Reece* and supporting the theory that the IRS must comply completely with the statutory requirements).

(2) *Van Skiver v. United States*

While *Van Skiver v. United States*, 751 F.Supp. 1522 (D.C. Kan. 1990), was affirmed, the Tenth Circuit expressly stated that it was not addressing the merits of the district court's decision concerning § 6335;[3] but rather, found the district court was without jurisdiction to render a decision on the merits of Van Skiver's motion for reconsideration.

There, the district court, by relying upon the *Howard* decision, also misread the *Reece* and *Aqua Bar* cases, which is the same misinterpretation advanced by United States. Further, the court's opinion is in conflict with Tenth Circuit precedents cited above requiring strict compliance with the statutory provisions of the Internal Revenue Code. *See also Silver Bell Industries, Inc. v. United States*, 76-1 U.S.T.C. 9432 (10th Cir. 1976); *Bonacci v. United States*, 864 F.Supp. 1986 (D.C. Utah 1993).

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[3] *Van Skiver*, 952 F.2d at 1245 ("We express no opinion on the merits of the arguments raised by plaintiffs in the motion and discussed by the district court").

(3) *Lawrence v. Beaman*

In *Lawrence v. Beaman*, 90-2 USTC 85,729 (D.C. Mass. 1990), an unpublished decision, the court explains that in cases where the plaintiff either had actual prior notice of the sale ***and failed to act***, or ratified the sale by subsequently accepting the excess proceeds, some courts have not invalidated the sale. Both actual notice without action and ratification existed in *Lawrence*.

In the instant matter, the Giaimos were not only engaged in the present litigation, but had filed an amended complaint ten (10) days before the sale of the subject property, which detailed all of the procedural violations advanced herein. The Giaimos filed a *lis pendens* at the time the amended complaint was filed; notified opposing counsel of the violations with substantial case authority after the sale; and moved for summary judgment months before the Director's Deed was issued. In short, the Giaimos acted. Ratification does not exist in the instant matter, since there were no excess proceeds. Thus, *Lawrence* is distinguished factually. Further, the courts reasoning was flawed by relying in part upon the *Howard* case.

(4) *McCoy v. United States*

In *McCoy v. United States*, 92-1 USTC 85,833 (N.D. Tex. 1992), another unpublished opinion, the court listed 38 paragraphs of adverse facts as to the tax history of the McCoys. Not only are the facts dissimilar to the case at

bar, but the *McCoy* court erred by adopting the reasoning of both *Howard* and *Lawrence*, which misinterpreted the dozens of rulings by both state and federal courts.

The notices at issue in the *McCoy* case were sent by certified mail to McCoy and her legal representatives. Subsequent to receiving the notices, but prior to the sale, McCoy contacted the IRS and requested an extension of time for the sale. McCoy did not, at the time, complain or assert to the IRS that she was unaware of the pending sale or that the § 6335 notices were not properly served or raise the notice issue as a bar to blocking the sale. The court stated that: "The time to object to the sale procedures was at or near the time of the sale, not two years later."

Not only did the Giaimos object, but the sale occurred while the district court had jurisdiction over this matter with the United States on notice of the procedural defects.

(5) *Westaire Properties, Inc. v. Tucker*

Westaire Properties, Inc. v. Tucker, 89-2 USTC 9473 (S.D. Cal. 1989) is no longer valid. The Ninth Circuit has ruled several times since this decision that strict compliance with § 6335 is required as discussed above.

The *Westaire Properties* decision is also another ratification case: "It sent its accountant to the Problems Resolution Division of the IRS for a full accounting of the tax deficiency after the sale, received an accounting, and subsequently cashed a refund check for a little over $4,000.

By these actions, plaintiff is at least acting in bad faith by indicating by its conduct it approved of the sale, and thereafter claiming lack of notice. By its conduct plaintiff clearly conveyed it was ratifying the sale."

(6) *Olsen v. United States*

Olsen v. United States, 90-2 USTC 50,457 (W.D. Pa. 1990), another unpublished opinion, provides zero analysis of its decision; the court merely cites *Howard*.

(7) *In re Hollar*

In *In re Hollar*, 184 B.R. 243 (M.D. N.C. 1995), an IRS agent attempted personal service first at the property owners' business and then at their home. At the business, Dr. Hollar's receptionist informed the agent that he could not see Dr. Hollar until late in the afternoon and informed him that Mrs. Hollar was at home. When he arrived at the home, Mrs. Hollar refused to answer the door. Conspicuously posted on the door, however, was a notice to federal officers not to attempt personal contact but to make all contact in writing by mail to a specifically stated address. The IRS agent returned to his office and complied with the Hollar's specific instructions as to how to contact them by mailing the notices return receipt requested to the address stated on Hollar's notice. The bankruptcy court found this service sufficient.

The decision is contrary to the statutory language and the controlling Fourth Circuit precedent of *Johnson*.

Obviously, the agent could have complied with § 6335 by either leaving the notices with Hollar's receptionist or on the door of their home. In any event, not only is this opinion legally incorrect, but also the decision is factually distinguishable.

(8) *Kaggen v. IRS*

The issue in the *Kaggen v. I.R.S.*, 57 F.3d 163 (2nd Cir. 1995), is not remotely involved herein. There, the taxpayers contended that § 6335(a) requires that a notice of seizure be given after seizure of intangible property. The United States contended that reference in § 6335(a) to property applies only to tangible property, and not to intangible property such as a bank account. The Second Circuit expressly noted that it was not determining this issue, but the United States nevertheless relied on the dicta in this case. In any event, the issue concerned a seizure of intangible property, and the Court's dicta if applied to real property would be in direct conflict with the controlling Second Circuit precedent of *Kulawy*. Further, the case had a strongly worded dissent by Circuit Judge Jacobs.

CONCLUSION

The United States must strictly comply with statutory and regulatory requirements as conditions precedent to valid seizure, sale and transfer of good property deed. The statutes and regulations must be strictly construed, construed against the United States, and in favor of the Giaimos. In the absence of literal compliance with any

single enabling statutory provision or procedure, the United States' conduct is invalid and so are any issuances therefrom; i.e., the Certificate of Sale and Director's Deed.

The United States did not personally serve the notice of seizure on Anthony Giaimo, nor did it personally serve the notice of sale on either Anthony or Laura Giaimo; neither did the IRS leave written notice at their home or place of business. Because the Giaimos live and work in the same district the property was seized, the United States failed to comply with the express notice requirements of § 6335.

Under the clear language of § 6335 and applicable federal court decisions, the alleged fear of Langvardt does not justify the United States failure to personally serve the Giaimos or leave notice at their home or business.

Because this Court has not addressed the specific basis upon which the Court of Appeals granted relief to the United States, the Court should issue a writ of certiorari to correct the conflict between the Court of Appeals' specific holding and the general principles expressed in the decisions of the Second, Fourth, Fifth, Ninth, and Tenth Circuits, the district court decisions on point, and those of this Court.

The procedure by which the United States may divest an individual of his constitutionally protected rights in property presents an important federal question that should be resolved by this Court.

Finally, because the Court of Appeals decision departs substantially from the relevant decisions of this Court requiring strict compliance with enabling statutes allowing non-judicial seizures and sale of property, this Court should settle this important due process question.

Respectfully submitted,

Anthony M. Giaimo
Laura Giaimo
14 Freedom Way
St. Charles, Missouri 63303
(314) 441-0123

APPENDIX A

Anthony M. Giaimo; Laura Giaimo, Appellants, v. United States Government; Stanley Matulewic, Appellees.

No. 97-1758

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

1998 U.S. App. LEXIS 2834

January 7, 1998, Submitted

February 23, 1998, Filed

NOTICE: RULES OF THE EIGHTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Missouri.

DISPOSITION: District Court's judgment affirmed.

COUNSEL: ANTHONY M. GIAIMO, Plaintiff - Appellant, Pro se, St. Charles, MO.

LAURA GIAIMO, Plaintiff - Appellant, Pro se, St.

Charles, MO.

For UNITED STATES GOVERNMENT, Defendants - Appellees: Tamera Fine-Trail, U.S. DEPARTMENT OF JUSTICE, Washington, DC. David English Carmack, Theodore Metcalf Doolittle, U.S. DEPARTMENT OF JUSTICE, Washington, DC. For STANLEY MATULEWIC, Defendant - Appellee: Cyril J. Clancy, St. Louis, MO.

JUDGES: Before FAGG, BOWMAN, and MURPHY, Circuit Judges.

OPINION:
PER CURIAM.

Anthony and Laura Giaimo, husband and wife, appeal from the District Court's n1 adverse grant of summary judgment in their action to set aside the sale of their properties and to quiet title in their names. After the government seized and sold the Giaimos' properties to satisfy their outstanding federal income tax liability, the Giaimos brought this action, arguing they received deficient notice of the seizure and sale. This court reviews the District Court's grant of summary judgment ***de novo***, ***see Thomas v. Gunter***, 103 F.3d 700, 702 (8th Cir. 1997) (standard of review). After conducting such de novo review of the record, and after carefully reviewing the parties' briefs and considering the Giaimos' arguments, we agree with the District Court that, in the circumstances, the Giaimos received sufficient notice of the seizure and sale

of their properties. We believe, as did the District Court, that the Giaimos should not be rewarded for their hostile and obstructive conduct. We therefore affirm the District Court's judgment. ***See*** 8th Cir. R. 47B.

n1 The Honorable Carol E. Jackson, United States District Judge for the Eastern District of Missouri.

APPENDIX B

ANTHONY GIAIMO, et. al., Plaintiffs, v.
SHIRLEY PETERSON, et. al., Defendants.

No. 4:94-CV-1447 (CEJ)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION

1997 U.S. Dist. LEXIS 3500

February 4, 1997, FILED

DISPOSITION: Case DISMISSED without prejudice.

COUNSEL: ANTHONY M. GIAIMO, plaintiff, Pro se, St. Charles, MO. LAURA GIAIMO, plaintiff, Pro se, St. Charles, MO.

For UNITED STATES GOVERNMENT, defendant: Tamera Fine-Trail, U.S. DEPARTMENT OF JUSTICE, Office of Special Litigation, Tax Div., Washington, DC. For STANLEY MATULEWIC, defendant: Cyril J. Clancy, St. Louis, MO.

JUDGES: CAROL E. JACKSON, UNITED STATES DISTRICT JUDGE

OPINIONBY: CAROL E. JACKSON

OPINION: ORDER

In accordance with the Order issued on April 12, 1996,

IT IS HEREBY ORDERED that the Clerk of the Court shall enter judgment in favor of defendant United States and against the plaintiffs with respect to the issue of notice contained in Count I of the third amended complaint. Plaintiffs shall bear the costs.

CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE
Dated this 4th day of February, 1997.

ORDER

In the Court's April 12, 1996 Order Relating To Trial, the parties were required to file pretrial materials no later than twenty days before the date of trial. Trial in this case is set for February 18, 1997, and the plaintiffs have not filed all of their pretrial materials. Accordingly, the Court dismisses this case without prejudice for failure to comply with the Court's April 12, 1996 Order. See Fed. R. Civ. P. 41(b).

For reasons stated above,

IT IS HEREBY ORDERED that this case is DISMISSED without prejudice.

CAROL E. JACKSON

UNITED STATES DISTRICT JUDGE
Dated this 4th day of February, 1997.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment be and it is entered in favor of defendant United States and against the plaintiffs with respect to the issue of notice contained in Count I of the third amended complaint. Plaintiffs shall bear the costs.

February 4, 1997
DATE

APPENDIX C

FILED
APR 12 1996
U.S. DISTRICT COURT
E. DIST. OF MO.
ST. LOUIS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ANTHONY M. GIAIMO, et al.	)	
Plaintiffs,	)	
v.	)	No. 4:94-CV-1447
UNITED STATES OF AMERICA et al.	)	
Defendants.	)	

MEMORANDUM

This matter is before the Court on the motion of plaintiffs Anthony M. Giaimo, Laura Giaimo, and A. Martin Giaimo Family Trust for summary judgment as to one of the allegations contained in Count I of the third amended complaint. See Fed.R.Civ.P. 56 Defendant United States has filed a memorandum in opposition to the motion.

Plaintiff brings this action, pursuant to 26 U.S.C. §§ 6331, 6334, and 6335, to quiet title to five parcels of real property seized and sold by defendant, to recover damages

for wrongful levy of the real property, and to recover federal income taxes erroneously paid to defendant. In their motion for summary judgment, plaintiffs contend that defendant's failure to comply strictly with the notice provisions of § 6335 invalidates the sale of the properties seized by defendant.

In March 1994, Dave Langvardt, a revenue officer in the Collection Division of the Internal Revenue Service ("IRS"), was assigned the task of collecting from plaintiffs unpaid federal income tax in the amount of $140,851. Langvardt's efforts to collect the delinquent tax included field visits to plaintiffs' places of business and residence, leaving business cards on at least three occasions at plaintiffs' place of business stating the importance of the matter and requesting that plaintiffs contact him, and making a number of attempts to contact plaintiffs by telephone at both their place of business and residence. Laura Giaimo telephoned Langvardt on March 24, 1994, arguing that no additional income tax was owed. Thereafter, plaintiffs refused to return Langvardt's telephone calls or speak with him regarding the matter.

On June 30, 1994, a notice of nominee federal tax lien was filed against five parcels of real property deeded to A. Giaimo Family Trust. Defendant concluded that because Anthony and Laura Giaimo were grantors, trustees, and sole beneficiaries of the trust, they were the real owners of the properties for the purposes of attaching the tax lien. To effectuate seizure of the properties, IRS officers placed warning tags at each of the five locations, hand delivered

the notices of seizure to Laura Giaimo, and told her that the properties would be offered for sale at a public auction if the delinquent taxes were not paid. Laura Giaimo argued that the officers were harassing her and trespassing on her property and threatened to file suit against them. Thereafter, in written correspondence to the district director of the IRS, plaintiffs disputed the legality of the tax lien and of the notices of levy and seizure, denied owing any additional federal income tax, accused Langvardt of harassment and trespassing, threatened to bring criminal charges against Langvardt and the IRS, and warned defendant to refrain from encroaching upon their private property. Plaintiff's sent letters containing similar allegations and threats to the commissioner of the IRS, the attorney general of the United States, and United States Congressmen. Because plaintiff posted "no trespassing" signs on their business premises in July 1994, Langvardt discontinued all efforts to communicate with plaintiffs in person.

Based on plaintiffs' actions and allegation, Langvardt concluded that plaintiffs could not be "readily located" for the purpose of personally serving the notice of sale. Consequently, the notices of sale were sent be regular and certified mail to plaintiffs' residence and places of business. Plaintiffs received the notices of sale on September 29, 1994 and, therefore, had actual notice of the intended sale. Plaintiffs' properties were sold at a public auction on October 27, 1994.

Rule 56(c) of the Federal Rules of Civil Procedure

provides that summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment the court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. AgriStor Leasing v. Farrow, 826 F.2d 732, 734 (8th Cir. 1987). The moving party bears the burden of showing both the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587 (1986); Fed.R.Civ.P. 56(c). Once the moving party has met his burden, the non-moving party may not rest on the allegations of the pleadings but must set forth specific facts, by affidavit and other evidence, showing that a genuine issue of material fact exists. Fed.R.Civ.P. 56(e). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

After property has been seized, written notice of the intended sale of the property must be provided by personal service to the owner of the property, or at the owner's

usual place of abode or business if he has such a place within the internal revenue district where the seizure is made. 26 U.S.C. § 6335; Powelson v. United States, 979 F.2d 141, 143 (9th Cir. 1992); Goodwin v., United States, 935 F.2d 1061, 1065 (9th Cir. 1991). If the owner cannot be readily located, or has no dwelling or place of business within the internal revenue district, the notice of sale may be mailed to his last known address. 26 U.S.C. § 6335. "[T]he extraordinary power granted to the government of levying, seizing, and selling property for tax collection purposes without prior judicial hearing are dependent upon strict compliance with the procedures prescribed by statute." Goodwin, 935 F.2d at 1065. Hence, absent literal compliance with the notice provisions of § 6335, the government sale of real property must be invalidated. Id.

Although Rule 56 of the Federal Rules of Civil Procedure does not require the moving party to negate the claims of the non-moving party, the party moving for summary judgment bears the initial burden of identifying relevant portions of the record corroborating his assertion that no genuine issue of material facts exits. White v. McDonnell Douglas Corp., 904 F.2d 456, 458 (8th Cir. 1990). In this instance, the pivotal issue is whether plaintiffs could not be readily located such that it was permissible to serve the notices of sale by mail. Plaintiffs have identified no facts in the record supporting therir assertion that defendant, by sending notices of sale by regular and certified mail, failed to comply strictly with the notice provisions of § 6335.

Although the Eighth Circuit has held that a district court has no authority to grant summary judgment sua sponte, a district court has the authority to grant summary judgment against the party moving for summary disposition even if the non-moving party has not filed a cross motion. Johnson v. Bismark Public School District, 949 F.2d 1000, 1004 (8th Cir. 1991). However, such a grant of summary judgment is proper only where the party against whom judgment will be entered was given sufficient advance notice and an adequate opportunity to demonstrate why the issue in controversy should not be decided by summary disposition. Madewell v. Downs, 68 F.3d 1030, 1048 (8th Cir. 1995). If both the moving and non-moving parties have responded to the motion for summary judgment, granting summary judgment in favor of the non-moving party is a proper determination on the merits of an issue that the parties obviously agreed should be decided in summary fashion. Johnson, 949 F.2d at 1005.

In this case, defendant submitted a memorandum in opposition to plaintiffs' motion for summary judgment and the affidavit of Langvardt. Thereafter, plaintiffs filed a memorandum in reply and additional documentation in support of their contention that defendant failed to comply strictly with the notice provisions of § 6335. Clearly, the parties contemplate the summary disposition of the issue in controversy in this case.

Defendant contends that it made a reasonable attempt to personally serve plaintiffs and has designated specific

facts in the record supporting its contention that plaintiffs were notified of the proposed sale of the seized properties in a manner contemplated and prescribed by the notice provisions of § 6335. The undisputed evidence is that plaintiffs posted "no trespassing" signs on the seized properties and sent letters to Langvardt and his supervisors, defendant's St. Louis district director and commissioner, the Attorney General of the United States, and a number of United States congressmen, threatening civil and criminal action against defendant for harassment and trespassing. Based on plaintiffs' actions and Langvardt's concern for his safety, defendant reasonably concluded that plaintiffs could not be readily located for the purpose of personally serving the notices of sale and properly sent the notices of sale by certified and regular mail to plaintiff's residence and businesses. The manner by which plaintiffs were notified of the proposed sale of the parcels of real property constituted strict compliance with the notice provisions of § 6335. Because plaintiffs have designated no specific facts in the record establishing the existence of genuine issues of material fact as to the propriety of the action taken by defendant to personally serve the notices of sale, summary disposition of this matter is appropriate. Id.

Accordingly, defendant is entitled to judgment as a matter of law with respect to the issue of notice contained in Count I of the third amended complaint. Plaintiffs' motion for summary judgment as to the issue of notice will, therefore, be denied and judgment on this issue will be entered in favor of defendant.

/s/
CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 12th day of April, 1996.